**EASTOOL INDUSTRIES SDN BHD**

**v.**

**GETFIRMS ELECTRONICS (M) SDN BHD (NO 1)**

HIGH COURT MALAYA, JOHOR BAHRU
ABDUL MALIK ISHAK J
[COMPANIES WINDING UP NO: 28-79-1999]
16 MARCH 2001

***COMPANY LAW:*** *Winding-up - Just and equitable rule - Companies Act 1965, s. 218(1)(i) - Reliance on presumption of inability to pay - Respondent filing affidavit in opposition - Failure to comply with r. 30(1) of the Companies (Winding-up) Rules 1972 as to service of affidavit - Whether affidavit admissible - Whether defect curable - Admission of part of debt - Whether fatal to respondent's case*

The respondent company was indebted to the petitioner company in the sum of RM40,336.44 being the rental due and owing for the use of the petitioner's machines. Pursuant to the Companies Act 1965, the petitioner served on the respondent a s. 218 statutory demand notice requiring the respondent to pay the said sum. The respondent who had 21 days to pay had failed, neglected and/or refused to pay that sum or any part thereof. The petitioner deposed that the respondent was unable to pay its debts and in the circumstances, the petitioner sought to wind up the company by a prayer to the court in encl. 2.

Further, the petitioners also raised the issue that the affidavit, encl. 12, that was submitted by the respondents to the petitioners to oppose the petition that the company be wound up, was not served to the petitioner within seven days before the time appointed for the hearing of the petition. It was submitted that this is in contravention of r. 30(1) of the Companies (Winding-Up) Rules, 1972 (the "Rules") and thus, was not admissible in court.

**Held:**

**[1]** The phrase "just and equitable" appearing in s. 218(1)(i) of the Companies Act 1965 gives the court a wide discretion to carry out its duty whether to grant a winding up of a company or not, as long as it would do justice to the parties concerned.

**[2]** Since the respondent did not pay within 21 days of the service of the notice of demand, no injunction could be issued against the petitioner to restrain it from petitioning for the winding up of the respondent. The failure of the respondent to pay as demanded would trigger the

presumption that the respondent was unable to pay its debt. This is a rebuttable presumption and the onus is on the respondent to show that it is able to pay the debt. In this instance, the respondent had failed to discharge that onus.

**[3]** Failure to comply with r. 30(1) of the Rules is fatal and not a mere irregularity. Such failure is not capable of being rectified by the court under rr. 193 and 194 of the said Rules. On the evidence, encl. 12 will not be considered in adjudicating encl. 2.

**[3b]** However, the said Rules are not perfect. It is not all encompassing and neither does it provide the necessary procedure to overcome defect or irregularity in an affidavit. In such situations, the Rules of the High Court 1980 would be used by the judges.

**[4]** The notice of demand showed the debt to be at RM40,336.44 but the respondent admitted owing part of the debt, *ie*, the sum of RM26,936.44. Based on *Chip Yew Brick Works Sdn. Bhd. v. Chang Heer Enterprise Sdn. Bhd.* this admission was certainly fatal as the sum of RM26,936.44 is not disputed, thus the respondent is caught as having neglected to pay it and is deemed to be unable to pay its debt. Under the circumstances, the court allows the petitioner's prayers as sought for in encl. 2.

*[Petition allowed.]*

**Case(s) referred to:**

*Ayerst (Inspector of Taxes) v. C & K (Construction) Ltd [1976] AC 167* ***(refd)***
*Chip Yew Brick Works Sdn Bhd v. Chang Heer Enterprise Sdn Bhd [1988] 2 CLJ 424* ***(foll)***
*Chong Chee Yan v. Golden Dragon Garden Sdn Bhd [1999] 3 CLJ 151* ***(refd)***
*Cornhill Insurance Plc v. Improvement Services Ltd [1986] 1 WLR 114* ***(refd)***
*Datuk Mohd Sari Datuk Hj Nuar v. Idris Hydraulic (M) Bhd [1997] 5 MLJ 377* ***(refd)***
*Fairview Schools Bhd v. Indrani C. Rajaratnam & Ors [1998] 1 CLJ 285* ***(refd)***
*Goh Boon Kim v. Taman Sungai Dua Development Sdn Bhd [1995] 4 MLJ 553* ***(refd)***
*Hong Leong Finance Bhd v. Delta Drive (M) Sdn Bhd [1999] 6 CLJ 62* ***(refd)***
*Kampat Timber Industries Sdn Bhd v. Bensa Sdn Bhd [1990] 1 CLJ 292* ***(refd)***
*Loo Mee Di v. Bioray Corporation (M) Sdn Bhd & Ors [1995] 4 CLJ 69* ***(refd)***
*Lyn Country Sdn Bhd v. EIC Clothing Sdn Bhd [1996] 4 CLJ 828* ***(refd)***
*Morgan Guaranty Trust Co of New York v. Lian Seng Properties Sdn Bhd [1990] 1 CLJ 119* ***(refd)***
*Ng Ah Kway v. Tai Kit Enterprise Sdn Bhd [1986] 1 MLJ 58* ***(refd)***
*Pioneer Concrete (Malaysia) Sdn Bhd v. Celini Corporation Sdn Bhd [1999] 5 CLJ 145* ***(refd)***
*Princess Reuss v. Bos [1871] LR HL 176* ***(refd)***
*PT Anekapangan Dwitama v. Far East Food Industries Sdn Bhd [1998] 4 CLJ Supp 437* ***(refd)***
*Re A Co [1985] BCLC 37* ***(refd)***
*Re A Company [1974] 1 All ER 256* ***(refd)***

*Re A & BC Chewing Gum Ltd, Topps Chewing Gum Inc v. Coakley [1975] 1 All ER 1017* ***(refd)***
*Re Broadway Enterprise Ltd [1972] 6 WWR 673* ***(refd)***
*Re Bryant Investment Co Ltd [1974] 2 All ER 683* ***(refd)***
*Re Fildes Bros Ltd [1970] 1 All ER 923* ***(refd)***
*Re Lundie Bros Ltd [1965] 2 All ER 692* ***(refd)***
*Re Lympne Investments Ltd [1972] 1 All ER 385* ***(refd)***
*Re Phoenix Oil and Transport Co Ltd (No 2) [1958] Ch 565* ***(refd)***
*Re Pre-Delco Machine and Tool Ltd [1973] 3 OR 115* ***(refd)***
*Re W R Willcocks & Co Ltd [1974] Ch 163* ***(refd)***
*Salomon v. Salomon & Co [1897] AC 22* ***(refd)***
*Sri Binaraya Sdn Bhd v. Golden Approach Sdn Bhd [2000] 7 CLJ 320* ***(refd)***
*Sri Hartamas Development Sdn Bhd v. MBf Finance Bhd [1992] 1 CLJ 637* ***(refd)***
*Tay Bok Choon v. Tahansan Sdn Bhd [1987] BCLC 472* ***(refd)***
*Vujnovich v. Vujnovich [1990] BCLC 227 PC* ***(refd)***
*YPJE Consultancy Service Sdn Bhd v. Heller Factoring (M) Sdn Bhd [1996] 3 CLJ 51* ***(refd)***

**Legislation referred to:**
Companies Act 1965, 181, 218(1)(i), (2)(a)
Companies (Winding-Up) Rules 1972, rr. 22, 24, 29(2), 30(1), 32(1)(a), (b), (c), (d), (e), 193, 194(1), Form 9
Rules of the High Court 1980, O. 18 r. 19(1)(d), O. 41 r. 11(2), 88

*For the petitioner - Yeo Wan Kun; M/s Allen & Gledhill*
*For the respondent - M. Govindarajoo; M/s Ahmed Bazari*
*For the official receiver - K. Presanth and (Jamaliah Talib with him)*

*Reported by Raja Vishnu*

## JUDGMENT

**Abdul Malik Ishak J:**

**Detailed Facts And The Exposition Of The Law**

This was a petition in encl. 2 by the petitioner – Eastool Industries Sdn Bhd, to wind up the respondent by the name of Getfirms Electronics (M) Sdn Bhd. Winding up is the surest way to extinguish the respondent's company (*Princess Reuss v. Bos* [1871] LR HL 176 at 193, 197, 202; and *Salomon v. Salomon & Co.* [1897] AC 22 at 30, HL) and it can be filed in any branch of the High Court of Malaya irrespective of the location of the respondent (*Goh Boon Kim v. Taman Sungai Dua Development Sdn Bhd* [1995] 4 MLJ 553). According to the case of *Re Phoenix Oil and Transport Co Ltd (No 2)* [1958] Ch 565 at 570 a winding up by the court simply means that the court is given the overall power to administer and, consequently, the court retains a greater degree of control over the destiny of the company. It goes without saying that once a company is being wound up, it triggers into operation a statutory

scheme to deal with the assets of the company (per Lord Diplock in *Ayerst (Inspector of Taxes) v. C & K (Construction) Ltd* [1976] AC 167 at 176-177, [1975] 2 All ER 537 at 540-541). But, before proceeding to examine the law any further, I must continue with the narration of the facts in regard to the petition in encl. 2. The respondent was incorporated on 5 November 1993 under the Companies Act 1965 and the registered office of the respondent was listed at 3rd floor, Wisma Wang, number 251-A Jalan Burma, 10350 Penang. The authorised capital of the respondent was said to be RM500,000 divided into 500,000 shares of RM1 each. The amount of the capital paid up or credited as paid came up to RM500,000. The respondent was established for the purpose of carrying on the business of manufacturing electronic products and that was said to be the object and nature of the respondent's company. It transpired that the respondent was indebted to the petitioner in the sum of RM40,336.44 as at 30 April 1998 being the rental due and owing for the use of the petitioner's machines. On 17 March 1999, the petitioner served on the respondent by hand at its registered office as alluded to above a s. 218 statutory demand notice pursuant to the Companies Act 1965 under the hand of the petitioner's solicitors M/s Allen & Gledhill requiring the respondent to pay the sum of RM40,336.44. Unfortunately, the respondent had failed, neglected and/or refused to pay that sum or any part thereof. The notice of demand was worded in the following terms:

NOTICE
(Pursuant to Section 218 of the Companies Act, 1965)

To:

GETFIRMS ELECTRONICS (M) SDN BHD
(Company No: 280832-X)
3rd Floor
Wisma Wang
251-A, Jalan Burma
Penang
(REGISTERED OFFICE)

**Re: Claim by Eastool Industries Sdn Bhd for the sum of RM40,336.44**

TAKE NOTICE that you are now required to pay to us as Solicitors for Eastool Industries Sdn Bhd the sum of Malaysian Ringgit forty-thousand three hundred thirty-six and cents forty-four only (RM40,336.44) as at 30.4.1998 being the amount due and owing by you to our client for rental payable for the use of the machines within twenty-one (21) days from the date of the service of this Notice, failing which you shall be deemed to be unable to pay aforesaid debts and appropriate action will be taken for the winding-up of Getfirms Electronics (M) Sdn Bhd.

Dated the 2nd day of March, 1999

Signed (Illegible)
Messrs Allen & Gledhill
Solicitors for Eastool Industries Sdn Bhd.

The notice of demand as worded must in law be considered to be good. The notice of demand need not be worded in a certain way nor must it follow a particular format because there is no prescribed form to follow. The function of the notice of demand is simply to warn the respondent as the debtor of an impending petition (*Sri Hartamas Development Sdn Bhd v. MBf Finance Bhd* [1992] 1 CLJ 637). The notice of demand must relate to a specified debt (*Re A Co* [1985] BCLC 37), which debt must be presently due and forthcoming (*Re Bryant Investment Co Ltd* [1974] 2 All ER 683) and that debt must be of a liquidated sum (*Ng Ah Kway v. Tai Kit Enterprise Sdn Bhd* [1986] 1 MLJ 58). There were no irregularities in the notice of demand and even if there were, I am not unduly perturbed. To me, the statutory presumption of insolvency arose so long as the sum claimed exceeded RM500 (*YPJE Consultancy Service Sdn Bhd v. Heller Factoring (M) Sdn Bhd* [1996] 3 CLJ 51) and of crucial importance would be whether the respondent was able to pay its debts (*Kampat Timber Industries Sdn Bhd v. Bensa Sdn Bhd* [1990] 1 CLJ 292).

Three weeks have since elapsed after service of the demand notice but the respondent played possum and had failed and neglected to pay or satisfy the debt of RM40,336.44 or any part thereof or to make any offer to the petitioner to secure or compound the debt. In short, the respondent has 21 clear days to pay and yet it refused to pay (s. 218(2)(a) of the Companies Act 1965 and *Re Lympne Investments Ltd* [1972] 1 All ER 385). As a creditor, the petitioner who was not paid was entitled under the law to file a petition to wind up the respondent and the court would certainly not be bothered as to the reasons behind the petitioner's course of action (*Morgan Guaranty Trust Co of New York v. Lian Seng Properties Sdn Bhd* [1990] 1 CLJ 119; and *Pioneer Concrete (Malaysia) Sdn Bhd v. Celini Corporation Sdn Bhd* [1999] 5 CLJ 145). It was said that the respondent was unable to pay its debts and in the circumstances the stand of the petitioner was that it was just and equitable that the respondent be wound up. For these reasons the petitioner prayed in encl. 2 for the following prayers:

(a) That the respondent – Getfirms Electronics (M) Sdn Bhd may be wound up by the court under the provisions of the Companies Act, 1965;

(b) That the Official Receiver of the States of Malaya be appointed as provisional liquidator of the company;

(c) That the costs of and incidentals to this Petition be paid out of the assets of the company; and

(d) Or that such other order may be made in the premises as shall be just

The phrase "just and equitable" appearing in s. 218(1)(i) of the Companies Act 1965 gives the court a wide discretion to carry out its duty according to the circumstances of the case so long as it would do justice to the parties. Thus, in varied situations where the agreements had been repudiated the courts in *Re Broadway Enterprise Ltd* [1972] 6 WWR 673; *Re Pre-Delco Machine and Tool Ltd* [1973] 3 OR 115 and *Re A & BC Chewing Gum Ltd, Topps Chewing Gum Inc v. Coakley* [1975] 1 All ER 1017, [1975] 1 WLR 579 found it just and equitable to wind up the companies. The courts too in *Tay Bok Choon v. Tahansan Sdn Bhd* [1987] BCLC 472, [1987] 1 WLR 413, [1987] 1 MLJ 433 PC and in *Vujnovich v. Vujnovich* [1990] BCLC 227 PC also found it expedient to order winding-up on just and equitable grounds even though it was the minority shareholders who were partly responsible for the breakdown in the relationship of the parties thereto. In the present case, the discretion was entirely mine to exercise whether to grant the petition in encl. 2 or otherwise.

The affidavit verifying petition was affirmed by Lim Seng Swee ("Lim"), the company director of the petitioner, on 28 April 1999 as seen in encl. 3 and there Lim deposed that he was duly authorised to affirm the affidavit on behalf of the petitioner and the facts deposed therein were said to be within his personal knowledge, information and belief unless otherwise stated. Lim then referred to the petition in encl. 2 which was annexed and exhibited as an exhibit marked as letter "A" and he deposed that the petition which related to the acts and deeds of the petitioner were true and he too believed that the statements as stated in encl. 2 which related to the acts and deeds of any person or persons were true.

It must be emphasised that the petition in encl. 2 was dated 26 April 1999 and it was filed on the same day, while the affidavit verifying petition in encl. 3 was dated on 28 April 1999 and filed on the same day.

This was a case, pure and simple, of the respondent who did not pay within 21 days of the service of the notice of demand, and no injunction could possibly be issued against the petitioner to restrain the latter from petitioning for the winding up of the respondent. The respondent cannot simply adopt a nonchalant attitude by saying that it could pay the debt but chose not to do so and if the respondent were to adopt that kind of attitude it would not be leniently treated by the court (*Cornhill Insurance Plc v. Improvement Services Ltd* [1986] 1 WLR 114). The failure of the respondent to pay as demanded

would trigger the presumption that the respondent was unable to pay its debt. This is a rebuttable presumption and the onus is on the respondent to show that it is able to pay its debt (*PT Anekapangan Dwitama v. Far East Food Industries Sdn Bhd* [1998] 4 CLJ Supp 437).

The process server of the Penang sessions court affirmed an affidavit on 8 July 1999 as seen in encl. 4 and there the male process server deposed that on 10 June 1999 at 10.30a.m. he had served the petition in encl. 2 dated 2 March 1999 on PFA Corporate Services Sdn Bhd with an address at Tingkat 3, Wisma Wang, No: 151A, Jalan Burma, Pulau Pinang and there the secretary for the respondent by the name of Miss Choong Hwei Fong had acknowledged receipt of encl. 2 and had put her signature and the stamp chop of PFA Corporate Services Sdn Bhd bearing its address on the reverse side of the first page of the petition in encl. 2. For convenience, the process server of the Penang sessions court annexed a copy of the petition in encl. 2 as an exhibit to encl. 4 and caused it to be marked as "A". I pause here to say that the process server of Penang sessions court made two obvious errors – more in the nature of typographical errors, in his affidavit in encl. 4. The first error was by deposing that he had served the petition in encl. 2 which he said was dated 2 March 1999 when in fact the petition in encl. 2 was dated 26 April 1999, and the irony of it all was that the petition in encl. 2 was annexed as an exh. "A" to encl. 4 and on checking exh. "A" it clearly showed that encl. 2 was dated 26 April 1999 and not 2 March 1999. The second error was by deposing the wrong address of PFA Corporate Services Sdn Bhd as Tingkat 3, Wisma Wang, No: 151A, Jalan Burma, Pulau Pinang when in fact the correct address should be Tingkat 3, Wisma Wang, No: 251A, Jalan Burma, Pulau Pinang. The stamp chop of PFA Corporate Services Sdn Bhd and its correct address appeared on the reverse portion of the first page of encl. 2 which was annexed to encl. 4 and marked as exh. "A" and that stamp chop bore the following legend:

Sgd: (Illegible) 10/6/99

PFA CORPORATE SERVICES SDN BHD
3rd Floor, Wisma Wang
251-A, Jalan Burma
10350 Penang, Malaysia
Tel: 04-2288155
Choong Hwei Fong

In my judgment, the irregularities in the affidavit of the process server of the Penang sessions court did not cause any injustice at all and certainly curable under r. 194(1) of the Companies (Winding-Up) Rules 1972 which states as follows:

> No proceedings under the Act or the Rules shall be invalidated by any formal defect or any irregularity, unless the Court is of the opinion that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order of the Court.

A male clerk of the law firm of M/s Allen & Gledhill purportedly affirmed an affidavit styled as an "affidavit of service by advertisement" as seen in encl. 5 and it was filed on 28 July 1999. I said "purportedly affirmed" because it was in fact not affirmed at all by that bungling clerk. In that affidavit the clerk said that he was able to write, read and converse in the English language and that he understood the contents of the affidavit in encl. 5. He said that as per r. 24 of the Companies (Winding-Up) Rules 1972, he was instructed to cause an advertisement of the companies winding-up petition to be advertised in the gazette and in the local newspapers. The gazette notification dated 24 June 1999 was exhibited as exhibit marked "A", while the advertisements appearing in the New Straits Times Press (M) Berhad on 11 June 1999 and in the Star Publications (M) Berhad on 10 June 1999 were both exhibited collectively as exh. "B". I must emphasise that in the course of adjudicating encl. 2, I will not consider encl. 5 at all.

Miss Yeo Wan Kun, an advocate and solicitor from M/s Allen & Gledhill, affirmed an affidavit in encl. 6 on 28 July 1999 and there she categorically stated that she had conduct of these proceedings and the facts deposed therein were said to be within her own personal knowledge and that she also had full knowledge of the matter at hand. To play safe, she also affirmed that she was able to write, read and converse in the English language and that she understood the contents of the affidavit affirmed by herself. As required under r. 32(1) of the Companies (Winding-Up) Rules 1972, she deposed that her law firm M/s Allen & Gledhill have duly performed the following acts:

(a) The advertisement of the petition was duly advertised in one insertion each in the Star Publications (M) Berhad on 10 June 1999 and the New Straits Times Press (M) Berhad on 11 June 1999 and the newspaper cuttings of the two advertisements were duly annexed collectively as an exhibit marked "YWK1".

(b) That the petition was duly gazetted on 24 June 1999 under legal notice no: 5774 at p. 7763 of the government gazette duly annexed and marked as exhibit "YWK2".

(c) The prescribed affidavit verifying petition was affirmed on 28 April 1999 and filed on the same day. The petition was served on the assistant official receiver on 27 May 1999, and on the registrar of companies on 27 May 1999, and on the respondent on 10 June 1999. Photocopies of the two letters enclosing the petition and addressed to the assistant official receiver

and the registrar of companies together with a photostat copy of encl. 4 to indicate service of the petition to the respondent were collectively annexed and marked as exh. "YWK3".

(d) A sum of RM300 was deposited with the assistant official receiver, Johor Bahru *vide* receipt no: CJB 962039 dated 31 May 1999 to cover the fees and expenses to be incurred by the liquidator which has yet to be approved. A copy of that receipt was annexed and marked as exh. "YWK4".

The hardworking deputy registrar of the High Court of Johor Bahru by the name of Che Mohamad Zulkifly bin Jusoh issued the registrar's certificate and he certified pursuant to r. 32(1) of the Companies (Winding-Up) Rules 1972 to the effect that the petitioner has duly complied with the requirements of r. 32(1)(a), (b), (c), (d) and (e) of the Companies (Winding-Up) Rules 1972, namely:

(a) The petition has been duly gazetted and advertised;

(b) The prescribed affidavit verifying the statements therein and the affidavit of service of the petition on the respondent company have been duly filed;

(c) The petitioner is not nominating its own liquidator and therefore no consent of any approved liquidator is required;

(d) The provisions of the rules as to petition have been complied with; and

(e) A sum of RM300 has been deposited to cover the fees and expenses to be incurred by the approved liquidator or the assistant official receiver as the case may be.

The registrar's certificate can be seen in encl. 7.

This was a case where the papers were perfectly in order. Every petition for the winding-up of a company must be in the prescribed form and with such variations as circumstances may require (see r. 22 of the Companies (Winding-Up) Rules 1972). No proceedings filed by the petitioner creditor whether it be under the Companies Act 1965 or under the Companies (Winding-Up) Rules 1972 are to be considered invalid on account of any formal defect or by virtue of being irregular unless the court considers that substantial injustice has been caused by that defect or irregularity. In *Hong Leong Finance Bhd v. Delta Drive (M) Sdn Bhd* [1999] 6 CLJ 62 the court held that the premature swearing or affirming of the affidavit verifying the petition was a mere irregularity and it was curable by the court as no injustice had been caused to the company. The court will always act judiciously and it will consider only the allegations

as set out in the petition (*Re Lundie Bros Ltd* [1965] 2 All ER 692, [1965] 1 WLR 1051; *Datuk Mohd Sari Datuk Hj Nuar v. Idris Hydraulic (M) Bhd* [1997] 5 MLJ 377; and *Re Fildes Bros Ltd* [1970] 1 All ER 923, [1970] 1 WLR 592) and it will not go beyond the petition. Vague allegations in the petition (*Re W R Willcocks & Co Ltd* [1974] Ch 163, [1973] 2 All ER 93) or allegations which were so unsatisfactory as to amount to an abuse of the court (*Re a Company* [1974] 1 All ER 256, [1973] 1 WLR 1566) would certainly entitle the court to strike out the petition in limine. In the present case, there was no infirmity to the petition in encl. 2. Everything was done above board.

The respondent through its solicitors M/s Ahmed Bazari & Associates filed a "notice of intention to appear on petition" as seen in encl. 10 and that notice dated 4 August 1999 was worded as follows:

> TAKE NOTICE that GETFIRMS ELECTRONICS (M) SDN BHD, a creditor for RM40,336.44 in the above company intends to appear on the hearing of the Petition advertised to be heard on the 6th day of August, 1999 and to oppose such petition.
>
> Dated this 4th day of August 1999.
>
> Signed. (Illegible)
> (SOLICITORS FOR THE RESPONDENT ABOVENAMED)
>
> To:
>
> M/s. ALLEN & GLEDHILL
> Solicitors for Eastool Industries Sdn Bhd
> Unit 18.01, 18th Floor
> Public Bank Tower
> Jalan Wong Ah Fook
> 80000 JOHOR BAHRU
>
> THIS NOTICE OF INTENTION TO APPEAR ON PETITION is filed by M/s Ahmed Bazari & Associates of No: 4574, Tingkat Satu, Jalan Telaga Air, 12200 Butterworth, Solicitors for the Respondent.

A memorandum of appearance dated 29 July 1999 was also filed by the solicitors for the respondent, namely, M/s Ahmed Bazari & Associates on 11 August 1999 and this can be seen in encl. 11.

The petition in encl. 2 came up for hearing on four occasions, namely :

(1) 6 August 1999;

(2) 19 August 1999;

(3) 20 August 1999; and

(4) 25 August 1999.

and I shall now endeavour to narrate as to what had transpired on those four occasions.

**6 August 1999**

Miss Yeo Wan Kun acted for the petitioner, while Mr. Mathews George was mentioning on behalf of the counsel who acted for the respondent.

According to Miss Yeo Wan Kun it was for the hearing of the petition in encl. 2 and she said that the papers were in order. She informed the court that the agreed debt came up to RM26,936.44 sen.

Mr. Mathews George submitted that he was asked to request for a short adjournment as counsel handling the case by the name of Mr. Govindarajoo was engaged in another case in Kuala Lumpur *vide* High Court civil suit number 22-959-1999. He then requested for one or two weeks' adjournment.

Miss Yeo Wan Kun responded. She said that she was not informed of the proposed adjournment. She pointed out that there was no letter from Mr. Govindarajoo. She stressed and drew the court's attention to the fact that the respondent did not file a single affidavit in opposition and she pointed out that the test of insolvency was whether the company was unable to pay its current debt as they fall due. She submitted that since both the parties had agreed to the reduced quantum of the debt, she then implored the court to grant an order in terms of the petition in encl. 2.

Mr. Mathews George in reply requested that the hearing of encl. 2 be adjourned.

I was magnanimous and I adjourned the hearing of encl. 2 to 19 August 1999. On reflection, I should have proceeded to hear the petition in encl. 2 forthwith after all the debt had been agreed by the parties at RM26,936.44 sen. I have more to say of this in the later part of this judgment.

**19 August 1999**

Again Miss Yeo Wan Kun appeared for the petitioner. Mr. K. Presanth acted on behalf of the official receiver. The papers were in order and I was urged to grant an order as per encl. 2. But since there was a letter from M/s Ahmed Bazari & Associates dated 12 August 1999 which was received by my secretary (referring to Mr. Ibrahim bin Jaafar) on 14 August 1999 seeking for the hearing of encl. 2 scheduled for 19 August 1999 to be adjourned to 20

August 1999 on the ground that Mr. Govindarajoo who had conduct of the matter had to appear in an injunction matter in the High Court of Kuala Lumpur *vide* Originating Summons number S7-24-959-1999 on 19 August 1999, I willingly allowed the adjournment. That letter craving for an adjournment from M/s Ahmed Bazari & Associates dated 12 August 1999 can be seen in encl. 9. It must be emphasised that the request for an adjournment by the respondent's counsel by letter as per encl. 9 was entertained notwithstanding the fact that no one turned up in court for the respondent on that day and no one mentioned for the respondent on that day as well. The letter in encl. 9 was not even extended by way of a copy to the solicitors for the petitioner on record. I then adjourned the hearing of the petition in encl. 2 to 20 August 1999.

**20 August 1999**

On that day, all the parties were represented. Miss Yeo Wan Kun acted for the petitioner, while Mr. Govindarajoo acted for the respondent and Mr. K. Presanth appeared for the official receiver.

Miss Yeo Wan Kun pointed out that it was for the hearing of the petition in encl. 2 for the purpose of winding up the respondent. She said that the papers were in order and she prayed for an order as per encl. 2.

Mr. K. Presanth confirmed that the papers were in order.

Mr. Govindarajoo submitted that the respondent disputed the petition and had filed a solitary affidavit to that effect. I responded and pointed out that that solitary affidavit was not found in the court file.

Miss Yeo Wan Kun pointed out that the petitioner was served with that affidavit on 18 August 1999 and it was outside the seven days period in contravention of r. 30(1) of the Companies (Winding-Up) Rules 1972 which states that:

> Affidavits in opposition to a petition that a company may be wound up shall be filed and a copy thereof served on the petitioner or his solicitor at least seven days before the time appointed for the hearing of the petition.

and, flowing from that, it was her submission that that affidavit was not admissible in court.

Mr. Govindarajoo meekly asked for time and he prayed that the matter be stood down for a short while. I stood down the matter as a matter of course.

On the resumed hearing, Miss Yeo Wan Kun informed the court that the respondent's counsel managed to trace the affidavit and that affidavit has now been marked as encl. 12 in the court file. She pointed out that encl. 12, the unsealed copy, was received by the petitioner on 18 August 1999. She submitted, quite rightly, that encl. 12 should be served at least seven days before the time appointed for the hearing of the petition in encl. 2. She submitted that today – meaning 20 August 1999, was the date scheduled for the hearing of the petition in encl. 2. She then submitted, calculation wise, if one were to take 20 August 1999 then the affidavit in encl. 12 should be served at least on 13 August 1992. If one were to take 19 August 1999 then the affidavit in encl. 12 should be served at least on 12 August 1999. She submitted that the court received encl. 12 on 17 August 1999 based on the date of its filing. She then submitted that encl. 12 was inadmissible as it ran counter to r. 30(1) of the Companies (Winding-Up) Rules 1972.

Mr. Govindarajoo said that he was not served with the preliminary objection. He informed the court that he had just contacted his office and he was told that his office has got proof that encl. 12 was sent by post 'laju' to the court on 13 August 1999 and he presumed that the court had received encl. 12 on 14 August 1999. In normal circumstances he said that it would take one day for delivery by post laju and he then prayed for an adjournment.

Miss Yeo Wan Kun admitted that the notice to raise the preliminary objection was not served on the respondent. In any event, according to her, the affidavit in encl. 12 was filed late in court which was on 17 August 1999 and this by itself had contravened r. 194(1) of the Companies (Winding-Up) Rules 1972. As I understood her, by this she meant that the delay in filing encl. 12 was not curable under that rule.

Nevertheless, Mr. Govindarajoo prayed for an adjournment while Miss Yeo Wan Kun objected to the adjournment. According to her the papers were in order.

Mr. Govindarajoo conceded that the date for the hearing of the petition in encl. 2 was today – referring to 20 August 1999, and he pointed out that he needed time to argue on the admissibility of the affidavit in encl. 12.

Mr. K. Presanth for the official receiver informed the court that he has yet to be served with the affidavit in encl. 12.

Mr. Govindarajoo again repeated that he needed an adjournment and suggested 25 August 1999 as the next date to argue on the admissibility of encl. 12. He reiterated that the hearing of the petition in encl. 2 was scheduled for today – meaning on 20 August 1999.

I then adjourned the hearing of encl. 2 to 25 August 1999 and the arguments as to the admissibility of encl. 12 to be heard on the same day.

**25 August 1999**

On that day, Miss Yeo Wan Kun appeared for the petitioner, while Mr. Govindarajoo acted for the respondent and Madam Jamaliah binti Talib appeared for the official receiver.

Miss Yeo Wan Kun reiterated her objection as to the admissibility of the affidavit in encl. 12 because it did not comply with r. 30(1) of the Companies (Winding-Up) Rules 1972 since encl. 12 was filed on 17 August 1999 and received by herself as counsel for the petitioner on 18 August 1999. She craved the court's indulgence not to accept encl. 12 and that an order for winding up of the respondent should be made. She submitted that since the hearing of the petition in encl. 2 had begun on 20 August 1999, this meant that the affidavit in encl. 12 should have been filed on 12 August 1999 and the same affidavit ought to have been received by the petitioner on the same day, meaning on 12 August 1999.

Mr. Govindarajoo responded and he submitted whether the affidavit in encl. 12 was accepted by the court or not, another affidavit was filed yesterday – meaning 24 August 1999, and that affidavit was none other than encl. 13. He submitted that the affidavit in encl. 13 would explain why the affidavit in encl. 12 was affirmed on 13 August 1999. He pointed out that exh. "MG10" as seen in encl. 13 would show the stamp chop of the High Court of Johor Bahru which bore the date as 14 August 1999 and this was the date the High Court of Johor Bahru accepted encl. 12 and subsequently encl. 12 was filed on 17 August 1999. Using exh. "MG10" of encl. 13 as a springboard he submitted that the affidavit in encl. 12 was received by the High Court of Johor Bahru on 14 August 1999 and the unsealed copy thereof was filed on 14 August 1999 and since the hearing of the petition in encl. 2 was scheduled to be heard on 20 August 1999, this meant that the respondent was not out of time in filing the unsealed copy of the affidavit in encl. 12. With respect, of crucial importance would be the date of the filing of the sealed copy of encl. 12 in the court. A perusal of encl. 12 as found in the court file showed that the sealed copy was filed on 17 August 1999. It was certainly filed late bearing in mind that the hearing of the petition in encl. 2 was scheduled on 20 August 1999. The late filing of encl. 12 as the affidavit in opposition to the petition in encl. 2 was certainly crucial as it contravened r. 30(1) of the Companies (Winding-Up) Rules 1972. This was my judgment and I so hold accordingly.

Of course, Miss Yeo Wan Kun was most unhappy with the presence of the affidavit in encl. 13. She vehemently objected to the presence of encl. 13. She rightly submitted that it raised other issues. According to her today – meaning 25 August 1999, Mr. Govindarajoo was supposed to show to the court when encl. 12 was received by the court. She rightly submitted that exh. "MG10" of encl. 13 showed the date of receipt by the court of encl. 12 to be on 14 August 1999. But the sealed copy of encl. 12 was filed on 17 August 1999 as shown in the court file and, calculation wise, encl. 12 was filed out of time bearing in mind that encl. 2 was scheduled for hearing on 20 August 1999. She also stressed that the petitioner also received the affidavit in encl. 12 quite late in the day, namely, on 18 August 1999.

Mr. Govindarajoo then adopted a new line of approach. He submitted that this court could exercise its discretion under r. 193 of the Companies (Winding-Up) Rules 1972 which states that:

> The Court may, in any case in which it shall see fit extend or abridge the time appointed by these Rules or fixed by any order of the Court for doing any act or taking any proceeding

and he too relied on r. 194 of the Companies (Winding-Up) Rules, 1972 in order to cure the irregularity.

Miss Yeo Wan Kun responded and she submitted that substantial injustice would be occasioned to the petitioner if abridgment was granted by the court. She pointed out, quite rightly, that the failure to comply with r. 30(1) of the Companies (Winding-Up) Rules 1972 was fatal and was not a mere irregularity. She submitted that encl. 12 was not only filed late in court, it was also served late on the petitioner and these delays were irregularities which struck at the very root of r. 30(1) of the Companies (Winding-Up) Rules 1972 and were not capable of being rectified by the court under rr. 193 and 194 of the Companies (Winding-Up) Rules 1972. I would agree wholeheartedly with her submissions on this point. She rightly submitted that winding up proceedings should be disposed off expeditiously. She rightly pointed out that the papers were in order right from the very beginning when the petition in encl. 2 was scheduled for hearing on 6 August 1999. She also rightly pointed out that it was the respondent who had applied for the adjournments on three occasions, namely, on 6 August 1999, 19 August 1999 and 20 August 1999.

Miss Yeo Wan Kun relied on O. 41 of the Rules of the High Court 1980 ("RHC") and she argued that encl. 13 ought not to be accepted by this court. She narrowed down her point of attack and she focussed her attention on the exhibits that were annexed to encl. 13 and she argued that there was non-compliance with O. 41 r. 11(2) of the RHC. That rule reads as follows :

> Any exhibit to an affidavit must be identified by a certificate of the person before whom the affidavit is sworn.

and all the exhibits in encl. 13 were sadly not "identified by a certificate" of the deponent. I have no hesitation to hold that the RHC should apply to matters that come within the ambit of winding up proceedings. I decline to follow *Lyn Country Sdn Bhd v. EIC Clothing Sdn Bhd* [1996] 4 CLJ 828, and *Chong Chee Yan v. Golden Dragon Garden Sdn Bhd* [1999] 3 CLJ 151. The Companies (Winding-Up) Rules 1972 do not provide the manner as to how an exhibit ought to be annexed to an affidavit. In such a situation, one must surely refer to the RHC for guidance (*Fairview Schools Bhd v. Indrani C. Rajaratnam & Ors* [1998] 1 CLJ 285 CA). Even O. 88 of the RHC generally applies to a variety of situations under the Companies Act 1965. An Anton Piller order to compel an urgent and immediate inspection of the register of the minute book was even allowed by using O. 88 of the RHC (*Loo Mee Di v. Bioray Corporation (M) Sdn Bhd & Ors* [1995] 4 CLJ 69). It is interesting to note that the court in *Sri Binaraya Sdn Bhd v. Golden Approach Sdn Bhd* [2000] 7 CLJ 320 held that O. 18 r. 19(1)(d) of the RHC can be relied upon in an application to strike out a petition presented under the Companies Act 1965. I venture to say that winding-up under s. 181 of the Companies Act 1965 attract the application of O. 88 of the RHC. The Companies (Winding-Up) Rules 1972 are not perfect. It is not all encompassing. It does not provide the necessary procedure to overcome defect or irregularity in an affidavit. The best way out and the only way out would be to refer to the RHC – the procedural guidebook for legal practitioners and a constant source of reference by judges.

For the reasons adumbrated above, I ruled that encls. 12 and 13 will not be considered by this court in adjudicating encl. 2.

Not to be outwitted, Mr. Govindarajoo raised the preliminary objection in regard to Form 9 and he relied heavily on r. 29 of the Companies (Winding-Up) Rules 1972. That rule reads as follows:

> (1) The petitioner or his solicitor shall prepare a list of the names and addresses of the persons who have given notice of their intention to appear in Form 9 on the hearing of the petition and of their respective solicitors.
>
> (2) On the day appointed for hearing the petition a fair copy of the list or if no notice of intention to appear has been given, a statement to the effect shall be handed by the petitioner or his solicitor to the court prior to the hearing of the petition.

and it was his submission that Form 9 was missing.

Miss Yeo Wan Kun responded. She drew my attention to encl. 10 – a notice of intention to appear on petition filed by the respondent, and it was worded in this way:

**NOTICE OF INTENTION TO APPEAR ON PETITION**

TAKE NOTICE that GETFIRMS ELECTRONICS (M) SDN. BHD. creditor for RM 40,336.44 in the above company intends to appear on the hearing of the Petition advertised to be heard on the 6th day of August, 1999 and to oppose such petition.

Dated this 4th day of August 1999.

Sgd. (Illegible)
...
(SOLICITORS FOR THE RESPONDENT
ABOVENAMED)

To:

M/s. Allen & Gledhill,
Solicitors for Eastool Industries Sdn. Bhd.
Unit 18.01, 18th Floor,
Public Bank Tower,
Jalan Wong Ah Fook,
80000 JOHOR BAHRU

This NOTICE OF INTENTION TO APPEAR ON PETITION is filed by M/s. Ahmed Bazari & Associates of No. 4574, Tingkat Satu, Jalan Telaga Air, 12200 Butterworth, Solicitors for the Respondent.

It must be borne in mind that encl. 10 should have been filed by a creditor or contributory of the respondent's company. But instead, encl. 10 was filed by the respondent and the respondent said that they are the creditor of their own company. Madam Jamaliah binti Talib who appeared for the Official Receiver, in style, submitted that in the present case Getfirms Electronics (M) Sdn Bhd was the respondent and in that position it cannot file encl. 10. She was rather blunt when she said that the respondent should not have filed encl. 10 at all. She further pointed out that the respondent as a party in the winding up petition cannot file a notice of intention to appear on petition as reflected in encl. 10. I am in total agreement with the pertinent submissions of Madam Jamaliah binti Talib.

Madam Yeo Wan Kun then handed to the court two documents marked as "A" and "B" and the court gave them enclosure numbers 15 and 14 respectively. These two documents were entitled "List of parties attending the

hearing of a petition" and they were worded in accordance with Form 9 of the Companies (Winding-Up) Rules 1972. I have to reproduce encls. 15 and 14 in succession. Enclosure 15 was worded thus:

**LIST OF PARTIES ATTENDING THE HEARING OF A PETITION**

The following are the names of those who have given notice of their intention to attend the hearing of the petition herein, on the 6th day of August, 1999.

| Name | Address | Name and Address of Solicitors of party who has given notice | Creditors. Amount of debt | Contri-butories. Number of shares | Opposing | Supporting |
|---|---|---|---|---|---|---|
| Nil | Nil | Nil | Nil | Nil | Nil | Nil |

and encl. 14 was worded in this way:

**LIST OF PARTIES ATTENDING THE HEARING OF A PETITION**

The following are the names of those who have given notice of their intention to attend the hearing of the petition herein, on the 6th day of August, 1999.

| Name | Address | Name and Address of Solicitors of party who has given notice | Creditors. Amount of debt | Contri-butories. Number of shares | Opposing | Supporting |
|---|---|---|---|---|---|---|
| Getfirms Electro-nicss (M) Sdn Bhd | 3rd Floor, Wisma Wang 251-A, Jalan Burma, Penang | M/s Ahmed Bazari & Associates | RM40,336.44 | | Yes | |

It would be apparent that encl. 14 showed the respondent to be the creditor of their own company and this was certainly an exercise in futility. Since the respondent was interested in challenging the petition, it should comply with r. 30(1) of the Companies (Winding-Up) Rules 1972 by filing and serving an affidavit in opposition to the petition within the stipulated time of "at least seven days before the time appointed for the hearing of the petition." Now,

even though the respondent had filed an affidavit in opposition as seen in encl. 12 yet as alluded to earlier it was filed and served beyond the statutory period.

In regard to encl. 15, by virtue of r. 29(2) of the Companies (Winding-Up) Rules 1972, I ruled that it was appropriately filed and that being the case the preliminary objection of Mr. Govindarajoo must fail in limine. In fact, at p. 23 of the notes of evidence Mr. Govindarajoo conceded that "form 9 can be filed on the date of the hearing of encl. 2 or even on the date of the continued hearing of encl. 2 today" – meaning on 25 August 1999. I must reject the preliminary objection of Mr. Govindarajoo forthwith. It was raised purely in an attempt to subvert the process of the hearing of the petition in encl. 2.

**The Petition In Encl. 2**

The notice of demand showed the debt to be at RM40,336.44 but the respondent admitted owing the petitioner the sum of RM26,936.44 and this admission was certainly fatal and this court had no choice but to allow the petition in encl. 2. This was a classic case where the respondent admitted part of the debt and in the words of Wan Hamzah SCJ in *Chip Yew Brick Works Sdn Bhd v. Chang Heer Enterprise Sdn Bhd* [1988] 2 CLJ 424, 425:

> Although in the letter "J" referred to by the learned judge the respondent company disputed the appellant's claim for $127,159, in its affidavits in support of its application for injunction the respondent company admitted that it owed the appellant a sum of $60,580 and stated that it was at all times ready and willing to pay this sum. In our judgment, as the debt of $60,580 is not disputed the respondent company is caught under section 218(2)(a) as having neglected to pay it and is deemed to be unable to pay its debt. The amount of the admitted and unpaid debt is substantial, and it was almost half of the amount claimed by the appellant. Therefore the appellant should not be prevented from pursuing its petition so that the court would be able to consider all evidence and determine whether it should exercise its discretion to order winding up or not to order it. If an order of winding up is made, the respondent company can still defend on the balance amount in dispute. Under the Act, the liquidator may defend any action or other legal proceedings in the name and on behalf of the company which has been ordered to be wound up. The Act also provides for the fixing of dates on which creditors are to prove their debts or claims against the company. Even where the whole amount of debt claimed is disputed, the court can allow evidence to be adduced to enable it to consider whether or not there was a *bona fide* dispute and the court is competent to go into the evidence to consider that question for the purpose ultimately of determining whether it should exercise the discretion: *Re Welsh Brick Industries Ltd.* [1946] 2 All ER 197).

But Mr. Govindarajoo was still adamant. He submitted that there was no evidence before the court that the respondent was unable to pay its debt. The law weighed heavily against the respondent. As I said earlier the failure of the respondent to pay as demanded had brought into sharp focus the presumption that the respondent was unable to pay its debt. The onus was entirely on the respondent to show that it was able to pay its debt and the respondent had failed to discharge that onus.

For the reasons adumbrated above, I allowed the prayers as sought for in encl. 2 especially prayers (a), (b), and (c).

**Addendum**

Only recently my former hardworking secretary in the High Court of Johor Bahru by the name of Mr. Ibrahim bin Jaffar alerted my equally hardworking secretary in the High Court of Kuala Lumpur by the name of Madam Rohani binti Abdul Rashid to the effect that the respondent had filed an appeal against my decision. She swiftly drew my attention to the situation at hand and, accordingly, I directed that the file be sent to me in Kuala Lumpur. Upon receipt of that file and within a week this judgment was prepared and they are now ready for distribution. Speed was certainly the order of the day in preparing this judgment once the file was sent to me.